THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Henry C. Davis	)	OEA Matter No. 1601-0020-07A08
Employee	)	
	)	Date of Issuance: August 25, 2008
v.	)	
	)	Joseph E. Lim, Esq.
	)	Senior Administrative Judge
Department of Youth Rehabilitation Services	)	
Agency	)	

F. Douglas Hartnett, Esq., Employee Representative
Gail Elkins, Esq., Agency Representative

ADDENDUM DECISION ON ATTORNEY FEES

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 17, 2006, Employee, a Supervisory Correctional Officer with Agency's Oak Hill Facility, filed a petition for appeal from Agency's final decision removing him from his position effective November 3, 2006. Agency alleged that Employee was in a Management Supervisory Service (MSS) position. Employee insisted that he was a Career Service employee.

On October 5, 2007, I issued an Initial Decision indicating that I had found that Employee is a Career Service employee and that he had been removed from his position without cause. I thus ordered Agency to reinstate Employee to his Career Service position of record, and reimburse him all pay and benefits lost as a result of the removal. The decision became final on November 9, 2007.

On December 10, 2007, Employee filed a motion for award of attorney fees, pursuant to OEA Rule 635.1.[1] Agency filed its opposition to the motion on January 4, 2008. In its response, Agency did not question the legality of Employee's fee petition, only its specifics. Employee submitted two amendments to his fee petition and filed his reply to Agency's opposition on January 16, 2008. The record is closed.

JURISDICTION

[1] OEA Rule 635.1, 46 D.C. Reg. 9320 (1999). Reads as follows: "An employee shall be entitled to an award of reasonable attorney fees, if: (a) He or she is a prevailing party; and (b) The award is warranted in the interest of justice."

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether the attorney fee requested is reasonable.

ENTITLEMENT OF EMPLOYEE TO ATTORNEY FEES

D.C. Official Code § 1-606.08 provides that "[An Administrative Judge of this Office] may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice." *See also* OEA Rule 635.1, *supra* at n.1.

1. Prevailing Party

"[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought. . . ." *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May 14, 1993), __ D.C. Reg. __ ( ). *See also Hodnick v. Federal Mediation and Conciliation Service,* 4 M.S.P.R. 371, 375 (1980). Employee appealed his separation from his position as an investigator with Agency and asked to be restored to his job with all back pay and benefits due him. Agency has not appealed this Office's final decision restoring Employee to his position by the April 21, 2008 deadline. Based on the record of this case, I conclude that Employee is a prevailing party.

2. Interest of Justice

In *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), the Merit System Protection Board (MSPB), this Office's federal counterpart, set out several circumstances to serve as "directional markers toward the 'interest of justice' (the "Allen Factors") - a destination which, at best, can only be approximate." *Id*. at 435. The circumstances to be considered are:

1. Where the agency engaged in a "prohibited personnel practice";

2. Where the agency's action was "clearly without merit" or was "wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency;

3. Where the agency initiated the action against the employee in "bad faith", including:

    a. Where the agency's action was brought to "harass" the employee;

    b. Where the agency's action was brought to "exert

pressure on the employee to act in certain ways";

4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee";

5. Where the agency "knew or should have known that it would not prevail on the merits", when it brought the proceeding, *Id.* at 434-35.

In this matter, Agency improperly removed Employee from his position without cause, and then insisted that Employee was in the Excepted Service despite the fact that it never properly reclassified Employee. Thus, Agency's engaged in a "prohibited personnel practice," and the agency's action was "clearly without merit." Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I conclude that Agency's actions are manifestations of Allen Factor #1 and #2, above. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

Counsel's submission was detailed and included the specifics of the services provided on Employee's behalf. Employee requested an award of $45,780.00 in attorney fees and costs for services performed from November 12, 2006, through May 29, 2008. Agency argued that the fee request is unjustified; that the fee petition includes work done before other tribunals and that Employee has not met his burden of proving that he is entitled to his fee request.

A. Hourly Rate

The burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. *Blum v. Stenson,* 465 U.S. 886 (1984). The best evidence of the prevailing hourly rate is ordinarily the hourly rate customarily charged in the community in which the attorney whose rate is in question practices. *Save Our Cumberland Mountains v. Hodel,* 857 F.2d 1516 (D.C. Cir. 1988).

The OEA Board has determined that the Administrative Judges of this Office may consider the so-called "Laffey Matrix" in determining the reasonableness of a claimed hourly rate.[2] The Laffey Matrix, used to compute reasonable attorney fees in the Washington, D.C.-Baltimore Metropolitan Area, was initially proposed in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). It is an "x-y" matrix, with the x-axis being the years (from June 1 of

[2] A copy of the Laffey Matrix, complete through June 1, 1994 - May 31, 2009, is attached to this addendum decision.

year one to May 31 of year two, *e.g*, 92-93, 93-94, etc.) during which the legal services were performed; and the y-axis being the attorney's years of experience. The axes are cross-referenced, yielding a figure that is a reasonable hourly rate. The Laffey Matrix calculates reasonable attorney fees based on the amount of work experience the attorney has and the year that the work was performed. Imputing the year allows for the rise in the costs of living to be factored into the equation.

The matrix also contains rates for paralegals and law clerks. The first time period found on the matrix is 1980-81. It is updated yearly by the Civil Division of the United States Attorney's Office for the District of Columbia, based on the change in the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, as announced by the Bureau of Labor Statistics for May of each year.

The following discussion will focus on the reasonableness of the requested rates *vis a vis* the Laffey Matrix. In the course of litigating this matter, Employee utilized the services of Attorneys E. Faye Williams and F. Douglas Hartnett. Although Employee failed to provide any information regarding Attorney Levy's education and work experience, the requested hourly rate is the minimum rate as per the Matrix and thus, is approved.

Employee is asking that Attorney E. Faye Williams be compensated at hourly rate of $614.00 for services rendered from November 12, 2006, through June 1, 2007, and at the hourly rate of $645.00 for services rendered from June 2, 2007, through September 15, 2007. Employee does not back up his hourly rate request as Attorney Williams failed to submit any documentation or affidavit regarding this attorney's education and experience.

The OEA Board has held that the failure to provide adequate factual support for attorney's hourly rate does not warrant a denial of fees. "The total denial of fees is a stringent sanction which is only justified in extraordinary circumstances." OEA Matter No. 1601-0018-86AF87, p. 4 (June 15, 1988), _D.C. Reg._( ). The presiding official is required to make a reasoned determination of a reasonable hourly rate.

Because Employee failed to provide any substantive information regarding Attorney Williams' experience and education, I will go on the safe presumption that she has at least one to three years legal work experience as an attorney. Thus I will use the hourly rate for such attorneys as indicated by the Laffey Matrix. The hours claimed in this matter were expended between November 12, 2006, and April 25, 2007. According to the latest Laffey Matrix for the Washington, D.C. area, the reasonable hourly rate for attorneys with at least one to three years legal work experience for work performed from June 1, 2006, through May 31, 2007, is $255; for work performed from June 1, 2007, through May 31, 2008, is $268. Thus I conclude that the reasonable hourly rate for Attorney Williams is $255 for services rendered from November 12, 2006, through June 1, 2007, and $268 for services rendered from June 2, 2007, through September 15, 2007.

Employee is also asking that Attorney F. Douglas Hartnett be compensated at hourly rate of $475.00 for services rendered from September 4, 2007, through May 29, 2008, and that Associate Roy Levy be compensated at the hourly rate of $255.00 for services rendered from September 18, 2007, through October 5, 2007. Employee backs up his hourly rate request with an affidavit by Attorney Hartnett detailing his education and legal experience.

Because these requested rates are in line with those listed in the Laffey Matrix, I hereby conclude that Attorney Hardnett's requested hourly rates are reasonable.

B. Number of hours expended

This Office's determination of whether Employee's attorney fees request is reasonable is based upon a consideration of the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). *See also Hensley v. Eckerhart*, 461 U.S. 424 (1983); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982). Although it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted, the fee application must contain sufficient detail to permit an informed appraisal of the merits of the application. *Copeland, supra*. The number of hours reasonably expended is calculated by determining the total number of hours and subtracting nonproductive, duplicative, and excessive hours. *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

Employee lists the hours and the type of work performed by date, month and year. Agency registers its opposition to the amounts claimed by stating that all legal work done at the Agency level and not before this Office should not be awarded. Agency asserts that the award of attorney fees must directly involve proceedings before the Office of Employee Appeals and points out that no hearing was conducted in this matter. Agency states that Employee has submitted invoices for legal services not performed before this Office.

Agency also asserts that many of the hours claimed were excessive and unnecessary. Specifically, Agency objects to the following: 1) 12/8/2004 prepare letter rescheduling DCPS hearing – 10 minutes or 0.17 hour; 2) 12/30/2004 Preparation for DCPS hearing – 2 hours 30 minutes or 2.5 hours; 3) 1/4/2005 Prepare for DCPS hearing – 6 hours 15 minutes or 6.25 hours; 4) 1/5/2005 Hearing DCPS - 6 hours 30 minutes or 6.50 hours. The total disputed hours is 15 hours 25 minutes or 15.42 hours. Thus, out of the 39 hours 20 minutes that Employee is claiming, Agency objects to 15 hours 25 minutes of it. Agency's objection rests on the premise that legal services performed at the Agency level should not be awarded by this Office.

Looking at the invoice submitted by Attorney Williams, I note that her computation of her hours is erroneous. Although she claimed twenty hours of work performed from November 12, 2006, to April 25, 2007, her own invoice shows that she performed a total of 19 hours. Of these 19 hours, one hour was expended on February 7, 2007, for work related to an Equal Employment

Opportunity Commission (EEOC) matter, and a total of two hours were for work related to an oversight hearing before the Council of the District of Columbia. Thus these will not be counted. In *Jenkins v. D.C. Public Schools,* OEA Matter No. J-0050-91AF92, *Opinion and Order* issued March 18, 1994, _D.C. Reg.__ ( ), this Office ruled that absent any statutory provision expressly granting such authority, this Office has no jurisdiction over the granting of attorney fees for work done before any court or tribunal other this Office. Thus, of the twenty hours claimed, I will award sixteen hours for the period of November 12, 2006, to April 25, 2007.

Attorney Williams also submitted a claim of twenty-five hours for work done from June 2, 2007, through September 15, 2007. Of these, Williams again claims two hours for work done for Employee's EEOC case, and thus will not be considered. Thus, of the twenty-five hours claimed, I will award twenty-three hours for June 2, 2007, through September 15, 2007.

The total number of hours approved for Attorney Williams is 39 hours. At the approved hourly rate of $255 for 16 hours or $4,080, and $268 for 23 hours or $6,164, the total approved attorney fees for Attorney Williams is $10,244.

Attorney Hardnett submitted his invoice of 14.4 hours for legal services performed from September 4, 2007, to December 10, 2007, at the hourly rate of $475. He also charges for an additional 7.40 hours incurred on May 2008 for his motions to enforce the decision and for drafting the amended fee petition, thereby asking a total of $10,355 for his personal services. In addition, Attorney Hardnett claims 13 hours worked by his associate Attorney Roy Levy at the hourly rate of $255 for a total of $3,315.

Agency objects to the number of hours claimed by Attorney Hardnett, contending that the appeal in this matter "did not involve complex, substantive issues, nor did it involve cutting edge issues in which the law is in a state of flux."[3] Agency argues that the "number of hours billed by an attorney of Mr. Hardnett's background and expertise, as well as the need for an additional staff member to work on this uncomplicated matter has not been supported."

I have reviewed the hours claimed, as well as Agency's objections to some of them, and have determined that Attorney Hardnett's claim of 7.40 hours for his motions is excessive. I thus reduce these to one hour. Hence, the total fees approved for Attorney Hardnett is $7,315 (15.4 hours times $475.)

As for Attorney Levy's hours, I note that three hours for drafting notices of appearance is excessive, and thus I reduce this to 30 minutes. I also note that his work relating to Employee's repossession is not directly related to this matter, and thus must be denied. I therefore reduce his hours to nine. Therefore, the total fees approved for Attorney Levy is $2,295 (9 hours times $255.)

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[3] Reid v. D.C. General Hospital, OEA Matter No. 1601-0180-90AF94, 47 DCR 118 (2000).

In summation, I find that the rest of Employee's claim for attorney's fees is reasonable. I therefore find that Employee has met his burden of proving that $19,854 of legal work expended in this Matter is proper and reasonable.

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, $19,854 in attorney fees and costs.

FOR THE OFFICE:

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JOSEPH E. LIM, Esq.
Senior Administrative Judge